

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN MITCHELL, No. C 07-5112 CW

v. Plaintiff, ORDER GRANTING FEDERAL  
DEFENDANT'S MOTION TO  
DISMISS

DR. HAROLD NEMETZ, OPEN DOOR  
COMMUNITY HEALTH CENTER, and U.S.  
DEPARTMENT OF HEALTH & HUMAN  
SERVICES,

Defendants.

Defendant the United States<sup>1</sup> moves to dismiss the complaint.  
Plaintiff Stephen Mitchell opposes the motion. The motion was heard  
on March 6, 2008. As stated at the hearing, the Court GRANTS the  
motion.<sup>2</sup>

BACKGROUND

Plaintiff claims that on October 18, 2002, he went to the Open  
Door Community Health Center in Crescent City, California to seek

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<sup>1</sup>Defendant has filed a certification pursuant to 28 U.S.C. § 2679(d). Therefore, the United States is the only proper Defendant in this action and is substituted in by operation of statute.

<sup>2</sup>Plaintiff recently filed an application to file a motion for reconsideration of the minute order from the March 6, 2008 hearing, including the Court's ruling on this motion. The Court has reviewed the application and the supporting declaration and finds that it does not provide grounds to permit the filing of a motion for reconsideration. See Civil Local Rule 7-9. Therefore, the Court DENIES Plaintiff's application (Docket No. 28).

1 treatment for a painful tooth. Open Door Community Health Center is  
 2 a federally deemed health center under the Federally Supported Health  
 3 Centers Assistance Act. See 42 U.S.C. § 233 (g)-(n). Plaintiff  
 4 alleges Dr. Harold Nemetz examined and diagnosed him with a vertical  
 5 fracture to tooth #2. Plaintiff claims that he signed a consent form  
 6 for the removal of tooth #2, but Dr. Nemetz, working for Open Door,  
 7 extracted the wrong tooth.

8 Plaintiff alleges that "within a short period of time, [he] was  
 9 experiencing extensive pain in the same area and confronted Dr.  
 10 Nemetz as to whether or not he extracted the wrong tooth." Complaint  
 ¶ 7. Plaintiff further alleges that Dr. Nemetz denied extracting the  
 12 wrong tooth. According to Plaintiff, "[s]ubsequent visits to two  
 13 dental offices could not confirm that a wrong tooth had been  
 14 extracted due to lack of dental records" but that "[b]oth Dentists  
 15 confirmed that the #2 tooth was still in place and was vertically  
 16 fractured." Id.

17 Plaintiff claims "damages for loss of a non-damaged tooth, the  
 18 costs for removal of the non-damaged tooth, additional dental  
 19 procedures to insert two (2) posts and a bridge for corrective  
 20 purposes, pain and suffering." Id. at ¶ 17.

21 On January 22, 2007, Plaintiff submitted a claim for damage to  
 22 the Department of Health and Human Services based on Dr. Nemetz's  
 23 actions. Id. at 12 and Ex. A. After his administrative claim was  
 24 denied, Plaintiff filed this complaint on October 4, 2007.

#### 25 DISCUSSION

26 Dismissal is appropriate under Rule 12(b)(1) when the district  
 27 court lacks subject matter jurisdiction over the claim. Fed. R. Civ.

P. 12(b)(1). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. See Thornhill Publishing Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987). The Court may consider matters outside the pleadings, but must accept as true all material allegations of the complaint and construe the complaint in favor of the plaintiff. See Fed. R. Civ. P. 12.

The United States, "as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The exclusive statute under which the federal government may be sued for personal injuries is the Federal Tort Claims Act (FTCA), which waives the sovereign immunity of the United States for certain torts committed by federal employees acting within the scope of their employment. See FDIC v. Meyer, 510 U.S. 471, 475-76 (1994). The act covers damages actions "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" by such employees. See 28 U.S.C. § 1346(b).

In United States v. Kubrick, the Supreme Court noted that compliance with the statute of limitations is a condition of the government's waiver under the FTCA. 444 U.S. 111, 117-18 (1979). Therefore, failure to file a timely FTCA claim is a jurisdictional defect. Zavala v. United States, 876 F.2d 780, 782 (9th Cir. 1989)

1       (citing Landreth v. United States, 850 F.2d 532, 533 (9th Cir. 1988),  
2       cert. denied, 488 U.S. 1042 (1989)).

3              The FTCA provides,

4              A tort claim against the United States shall be forever  
5              barred unless it is presented in writing to the  
6              appropriate Federal agency within two years after such  
7              claim accrues or unless action is begun within six months  
8              after the date of mailing, by certified or registered  
9              mail, of notice of final denial of the claim by the agency  
10             to which it was presented.

11       28 U.S.C. § 2401(b). Defendant argues that Plaintiff's claims are  
12       time-barred because the administrative complaint was filed more than  
13       two years after the claim accrued.

14              "In a medical malpractice case under the FTCA, a claim accrues  
15              when the plaintiff discovers, or in the exercise of reasonable  
16              diligence should have discovered, the injury and its cause."  
17       Landreth, 850 F.2d at 533. Defendant argues that Plaintiff's claim  
18       accrued at the latest on September 14, 2004, citing a letter  
19       requesting medical records from Plaintiff's counsel to a dentist  
20       named Dr. Row. That letter states that Plaintiff informed counsel  
21       "that the purpose of his visit to Dr. Nimitz [sic] was to [have] a  
22       fractured tooth removed. He informs us that the wrong tooth was  
23       removed in error at that visit." Peters Decl., Ex. B. The letter  
24       goes on to state, "It is our understanding that a fractured tooth was  
25       removed surgically in your office. Also, that additional dental work  
26       has been diagnosed which may require three separate procedures." Id.

27              This letter establishes that Plaintiff had actual knowledge of  
28       the alleged injury by September 14, 2004. Therefore, the latest date  
     on which he could have filed a timely claim was September 14, 2006.  
     Plaintiff did not file a claim with the Department of Health and

1 Human Services until January 22, 2007.

2 Plaintiff's claim that the statute of limitations should be  
3 tolled because Dr. Nemetz fraudulently concealed his negligent act is  
4 unavailing. To toll the statute of limitations on a theory of  
5 fraudulent concealment, a plaintiff "must plead facts showing that  
6 [the defendant] affirmatively misled it, and that [the plaintiff] had  
7 neither actual nor constructive knowledge of the facts giving rise to  
8 its claim despite its diligence in trying to uncover those facts."

9 Conmar Corp. v. Mitsui & Co., 858 F.2d 499, 502 (9th Cir. 1988).

10 Plaintiff had actual knowledge of the facts giving rise to his claim  
11 more than two years before he filed his claim.

12 CONCLUSION

13 For the foregoing reasons, Defendant's motion to dismiss is  
14 GRANTED (Docket No. 15). Because amendment would be futile, the  
15 dismissal is with prejudice. The Clerk shall enter judgment in favor  
16 of Defendant and close the file. Each party shall bear its own  
17 costs.

18 IT IS SO ORDERED.

19 4/2/08

20 Dated: \_\_\_\_\_



21 CLAUDIA WILKEN  
22 UNITED STATES DISTRICT JUDGE